

The Yale Law Journal

Volume 85, Number 6, May 1976

Federalized Res Judicata

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The recognition due in the courts of one state to the judicial proceedings of another is an essential element of the American Union. Article IV, § 1, of the Constitution requires that "Full Faith and Credit" be given in each state to the "public Acts, Records, and judicial Proceedings of every other State." The recognition of judgments when a federal court is involved—the effect of state judgments on proceedings in federal courts and the effect of federal judgments in state courts and other federal courts—is not governed explicitly by the terms of Article IV, but is no less important. Still, it is a problem that has received far less attention and is not yet thoroughly worked out.

Four developments of a generation ago have created new uncertainties and spawned several dubious lines of decision. These four developments, almost concurrent in time though probably accidentally so, were the substantial expansion of the judicial conception of what is included within the scope of a claim or cause of action;¹ the influential decision of the California Supreme Court in *Bernhard v. Bank of America National Trust & Savings Association*² that mutuality of estoppel was no longer required for collateral estoppel effect to be given to judgments; the decision in *Erie Railroad v. Tompkins*,³ requiring federal courts in diversity cases to look to state law as state courts had made it rather than to their own independent conception of the common law; and the adoption of the Federal Rules of Civil Procedure, effective in 1938, the same year as *Erie*.

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1. Details of this transformation will be explored at pp. 764, 766-67, 771-73 *infra*. For the present, it is sufficient to contrast RESTATEMENT OF JUDGMENTS §§ 61-67 (1942) with RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment (Tent. Draft No. 1, 1973) and the appended Reporter's Note. One feature to be considered is the effect of the expanded concept of a "claim" on the ancillary jurisdiction of federal courts. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

2. 19 Cal. 2d 807, 122 P.2d 892 (1942) (Traynor, J.).

3. 304 U.S. 64 (1938).

At the outset, I venture a yet undocumented assertion. Courts and judges of the 19th century shared a common understanding of *res judicata* in terms of *what* a judgment decided.⁴ The questions they asked about *res judicata* were largely, if not entirely, about what *kind* of proceedings were entitled to respect and enforcement. Because this common agreement no longer exists, the modern question is better phrased as: to what faith and credit is a particular judgment entitled? As this article discusses the statutes and cases bearing on the question, a central theme will, I hope, emerge: the effect of a judgment rendered by *any* court within the United States on judicial proceedings in *any* other jurisdiction is in the last analysis a matter of federal law.

Before embarking upon that quest, I must first account for a historical development that the Constitution itself may permit, but certainly does not require in its words. Why does any faith and credit at all attach to federal judgments?

I. A Historical Survey

Two historical sketches are necessary background—one of the evolution of the constitutional concept of full faith and credit and the other of the development of the full faith and credit doctrine between state and federal courts. The first is brief because my own research has uncovered nothing new; the summary provided here for readers not familiar with the scattered literature is a composite of the work of others.⁵ The second sketch is more expansive because it is, I hope, more original and is central to a full understanding of the developments of the past 40 years.

A full faith and credit clause bearing that name first appeared in the Fourth Article of Confederation. It was similar both in phrasing

4. As illustration, see 2 H. BLACK, JUDGMENTS §§ 500-07 (1891) for a sense of what *res judicata* meant to courts at that time. Differences in application could doubtless be found, but the rules were unitary and uniform. The major exception was Louisiana, with its civil law tradition. No doubt this accounts for the disproportionate number of Louisiana cases in which *res judicata* issues have arisen, as the text of this article will disclose. The Fifth Circuit is especially alert to these problems, having faced them often. See, e.g., *Maier v. City of New Orleans*, 516 F.2d 1051, 1055-58 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3685 (U.S. June 1, 1976).

5. A. EHRENZWEIG, CONFLICT OF LAWS 166-67 (1962); H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 394 (4th ed. 1964); Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 434 (1919); Costigan, *The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of That Section and of Federal Legislation*, 4 COLUM. L. REV. 470, 481 (1904); Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944); Ross, *Full Faith and Credit in a Federal System*, 20 MINN. L. REV. 140, 140-48 (1935); Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96 (1965).

and content to the one found in Article IV of the present Constitution. The Article of Confederation lacked, however, the reference to "public Acts" (with which we will not be concerned), and it contained no clause permitting legislative implementation.⁶

The actual term "full faith and credit" was employed in the English language long before the Articles of Confederation,⁷ but it seems to have little ancestry in legal usage or in the area of *res judicata*.⁸ English courts were inclined to respect and often followed judgments of foreign courts, but did not speak of according those judgments (or "sentences," in continental usage) any "faith" or "credit," "full" or otherwise.⁹ Two pieces of colonial legislation, in Connecticut¹⁰ and Massachusetts,¹¹ provided some *res judicata* effect for judgments from the courts of other colonies, but employed neither the conjunctive "and" nor the adjective "full." So the origin of a legal phrase of great importance to our federal system remains obscure.

The Constitution provides only that "each State" shall honor the judicial proceedings "of every other State." And it is only as to "such Acts, Records and judicial Proceedings" and "the Effect thereof" that the Congress is given an implementing power. But in 1790, so close to the adoption of the Constitution that it has been described by the Supreme Court as "contemporaneous,"¹² Congress required by statute that *federal* courts accord the judgments and proceedings of state courts the same "faith and credit" they enjoyed by "law or usage" in the court of rendition.¹³ Later, in 1804, Congress added what is, substantially, the present language on how the existence of the first judg-

6. See Radin, *supra* note 5, at 2-12.

7. See D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 348 (1963).

8. Ross, *supra* note 5, at 140 & n.4, attempts to trace the origin of the term in legal usage and finds an interesting 16th century translation of the Bull of Demarcation of Pope Alexander VI, dividing South America between Spain and Portugal, which employs the expression "same fayth and credite." But Ross points out that it is a less than faithful rendition of the original wording, although it may convey the idea which the Latin expresses.

9. See Ross, *supra* note 5, at 140-41. Radin, *supra* note 5, at 13, quotes Lord Nottingham in *Cottington's Case*, 2 Swans. 326, 36 Eng. Rep. 640 (Ch. 1678), as saying, "It is against the law of nations not to give credit to the judgments and sentences of foreign countries" I have located a dissenting opinion of Lord Chief Justice Eyre saying that when foreign judgments were sued upon, English courts gave them only *prima facie* effect, but when they were raised defensively, "we give *entire faith and credit* to the sentences of foreign courts, and consider them as conclusive upon us." *Phillips v. Hunter*, 2 H. Bl. 402, 409, 126 Eng. Rep. 618, 622 (Ex. 1795) (emphasis added). The phrase is similar but not identical, and the date too late to be of assistance.

10. See A. EHRENZWEIG, *supra* note 5, at 167.

11. See Radin, *supra* note 5, at 17-18.

12. See *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 326 (1839). That case is a state-to-state rather than a state-to-federal application.

13. Act of May 26, 1790, ch. XI, 1 Stat. 122.

ment should be proved.¹⁴ (The statute is presently codified at 28 U.S.C. § 1738.)¹⁵ The nearly contemporaneous enactment of this "implementing statute" suggests there was an unexpressed assumption that if federal courts inferior to the Supreme Court were created (the *if* because it was not at all clear to the Constitutional Convention that lower federal courts were needed¹⁶), the power to prescribe what effect those courts must give to state court judgments was at least inferentially included in the congressional authority.

Conspicuously lacking in either the Constitution or the statute of 1790 is a reverse clause—that state courts are required to give some recognition, some faith and credit, to the judgments and proceedings of federal courts. On their face neither Article IV, § 1, of the Constitution nor the statute compels the state courts to give any respect, much less full faith and credit, to federal judicial proceedings.

From where, then, comes the clearly established rule that state courts must give full faith and credit to the proceedings of federal courts? That this is the rule is beyond doubt, and the state courts have generally accepted it. Indeed, the only semblance of resistance has appeared when there seemed to be something "wrong" with the judgments presented; it has never stemmed from a refusal by state courts to accept the general proposition that federal judgments as such are as binding on them under *res judicata* principles as are the judgments rendered by courts within their own system.¹⁷ The Supreme

14. Act of Mar. 27, 1804, ch. 56, 2 Stat. 298.

15. The statute was slightly modified in 1948, substituting "Possession of the United States" for "of any country subject to the jurisdiction of the United States." The pertinent language of the statute now reads:

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

16. See P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 11-12 (2d ed. 1973); C. WRIGHT, *FEDERAL COURTS* 2 (2d ed. 1970).

17. Even prior to the elaboration of such a rule by the Supreme Court in the late 19th century, the state courts in general gave *res judicata* effect to federal court judgments. I have found no instance in which a state court even noted that it was not bound by either the Constitution or the statute to respect federal adjudications. In fact, they seldom cite any authority other than the general principle of *res judicata*, even when they are reluctant to accept the federal disposition.

A sampling of cases follows: *Semple v. Hagar*, 27 Cal. 163, 170 (1865), *appeal dismissed*, 71 U.S. (4 Wall.) 431 (1866) (where a federal court had already ruled on the validity of a Mexican land grant against charges of fraud: "[C]an the Courts of this State set aside, or indirectly review the decisions of the Federal Courts? This is not an open question."); *Harrison v. Phoenix Mut. Life Ins. Co.*, 83 Ind. 575, 577 (1882) (federal judgment on seniority of

Court has consistently assumed that the implementing statute of 1790 required such recognition.

The major difficulty with this accepted state of the law is that, as we have seen, it rests on no explicit constitutional or legislative authority. The literature which has explored the problem adds little to an understanding of either the puzzle or the result. The present inquiry is therefore necessary, but fortunately the cases it must address are few and were decided over a period of only about 25 years. The Supreme Court never referred to the problem before the Civil War, and the now-established rule had crystallized before 1900.

The earliest discussion I have found is that of Justice Bradley in *Dupasseur v. Rochereau*.¹⁸ Previously, in 1865, a Louisiana federal court sitting in alienage diversity had foreclosed a mortgage. The issue posed in *Dupasseur* was whether Rochereau, who was not named a party in the federal proceeding, could litigate the priority of his mortgage on the same property in a subsequent Louisiana state case. The opinion says:

The only effect that can be justly claimed for the judgment in the Circuit Court of the United States, is such as would belong to judgments of the State courts rendered under similar circumstances.¹⁹

lien attacked in state court: "It would be strange, indeed, if the State courts should have a right to review the judgments of the Federal tribunals. It can not be necessary to cite authorities in support of this principle"; *Thomson v. County of Lee*, 22 Iowa (1 Stiles) 206 (1867) (Illinois federal judgment sued on in Iowa, and defendant argued that federal judgments were rendered by "foreign and not domestic tribunals." *Id.* at 207. The court answered: "[S]till we find, upon an examination of the Constitution and laws of the United States, and the decisions of the courts construing and applying them, that the Circuit Courts of the United States are not to be regarded as foreign tribunals by the courts of States other than that in which the federal court was holden which rendered the judgment" *Id.* at 209); *Pigot v. Davis*, 10 N.C. (3 Hawks) 25, 27 (1824) (action of detinue brought for slave sold under judgment of federal court for North Carolina. According to North Carolina judge earlier judgment was "pronounced by a Court as stable, and as strongly constituted by the Constitution and laws of the country, as the Court we sit in, and it is a Court too of competent jurisdiction").

Even under extreme provocation this view was followed. In *Ames v. Slater*, 27 Minn. 70, 75, 6 N.W. 418, 419 (1880), a Kentucky corporation had filed a probate claim in a Minnesota court, where the claim was denied; the denial was approved by the Minnesota supreme court. Thereafter the corporation sued the administrator in the federal court in Minnesota, obtaining a large judgment. The Minnesota court held that it must respect the federal judgment even though the federal court's failure to honor Minnesota's own prior adjudication was "erroneous." The federal judgment was "valid as it stands."

References to the federal-to-state problem did not appear in early editions of Story's *Conflict of Laws*. The editor who prepared the fourth edition from Story's own manuscript added the following, in brackets, to indicate that he was embellishing upon Story's wording: "[And the same rule applies to judgments of the Circuit Courts of the United States, when relied upon in a State Court.]" Cited in support are two state court cases. J. STORY, *CONFLICT OF LAWS* § 609 (4th ed. 1852).

18. 88 U.S. (21 Wall.) 130 (1874).

19. *Id.* at 135.

Since the court sat in diversity, "its proceedings were had in accordance with the forms and course of proceeding in the State courts."²⁰ Not having been a party in the federal case, Rochereau would not be bound under general notions of *res judicata*. Because there was nothing "peculiar"²¹ to Louisiana law which would have bound him to a similar state court judgment, the federal judgment did not bind him either.

The next case, *Embry v. Palmer*,²² is the one most often cited for the rule that state courts must give full faith and credit to federal adjudications. It is also easily misunderstood and is worth quoting from at length to show why. The Supreme Court of Errors of Connecticut had refused to honor a District of Columbia judgment, not because it was a federal judgment, but because of a persuasive showing that it had been obtained by an extraordinary combination of misleading behavior by the plaintiff and an excusable omission by the defendant.²³ The Court first quoted from the implementing statute as it then read:

[The statute] provides that the records and judicial proceedings, not only of the courts of any State, but of any Territory, or of any country subject to the jurisdiction of the United States . . . "shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from which they are taken;" . . .²⁴

And then the Court stated:

So far as this statutory provision relates to the effect to be given to the judicial proceedings of the States, it is founded on art. 4, sect. 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power

20. *Id.* The Court attached no significance to the fact that the federal circuit court proceedings might have been regarded as in equity. In matters of equity, the procedure of federal courts sitting in Louisiana was distinctly federal, although for a reason different from other states. Under the Act of May 26, 1824, ch. 181, 4 Stat. 62, Louisiana federal courts were made conformable to state practice and procedure in "civil causes," held to include both law and equity. *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656-57, 660 (1835). However, because Louisiana had no state courts of chancery, and thus no state rules of equity practice, federal equity practice was held to govern in their absence. *Id.* at 657, 660; *Gaines v. Relf*, 40 U.S. (15 Pet.) 9, 14-16 (1841).

21. 88 U.S. at 137.

22. 107 U.S. 3 (1882).

23. The defendant had allegedly refrained from raising a good defense in the District of Columbia action because of false assurances by the plaintiff. *See id.* at 12.

24. *Id.* at 9.

of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District which the Constitution has given to Congress. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced. . . .

The rule for determining what effect shall be given to such judgments is that declared by this court, in respect to the faith and credit to be given to the judgments of State courts in the courts of other States, in the case of *M'Elmoyle v. Cohen*, 13 Pet. 312, 326, where it was said: "They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered."²⁵

The Court's reasoning is perplexing: it suggests that because the statute requires states to recognize judgments of territorial courts, and because territorial courts are courts "of the United States," the statute thereby requires the states to recognize the judgments of *all* "courts of the United States." But the result seems plain: federal judgments are as powerful in state courts as are judgments of other states.

The next significant Supreme Court case arose from concurrent litigation in federal and state courts in Louisiana over the continued validity of the monopoly on butchering sustained in the famous *Slaughter-House Cases*.²⁶ A federal circuit court found the monopoly still valid in a decision that was later reversed by the Supreme Court for reasons not pertinent here.²⁷ Prior to its reversal, however, a Louisiana court in a suit between the same litigants awarded damages for malicious prosecution, despite the Louisiana rule that a party who relied upon an outstanding decision of a tribunal with jurisdiction of the parties had an absolute defense to malicious prosecution—*i.e.*, good

25. *Id.* at 9-10 (citations omitted).

26. 83 U.S. (16 Wall.) 36 (1873).

27. *Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co.*, 111 U.S. 746 (1883).

faith—even if the decision were later reversed. Hearing an appeal from this award in *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, the Supreme Court cited *Embry* for the proposition that

judgments and decrees of the Circuit Court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority.²⁸

On this basis, the state award was vacated even though the Court had previously recognized error in the federal decree upon which the defendant in the suit for malicious prosecution had relied in Louisiana state court. The decision was not the usual invocation of the principle of *res judicata* under the name of full faith and credit, but a ruling that full faith and credit forbade any rule that discriminated against a federal judgment by making it a less effective defense than a state court judgment.

The holdings in *Embry* and the cases following it²⁹ are more understandable than the explanations given. One can well ask what compels the conclusion just quoted, that the scope and effect of a federal judgment are identical to those of a judgment of a court of the state in which the federal judgment is rendered. *Metcalf v. Watertown*,³⁰ which was probably the last attempt by the Court to elucidate the effect states must give to federal adjudications, merely repeats³¹ the general language of *Embry v. Palmer*. The Court clearly read the implementing statute as prescribing the effect to be given federal judgments, despite its lack of any explicit provision to that end, and as

28. 120 U.S. 141, 147 (1887).

29. *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1900); *Supreme Lodge, Knights of Pythias v. Meyer*, 265 U.S. 30, 33 (1924).

30. 153 U.S. 671 (1894).

31. So far as that section relates to the effect to be given to the judicial proceedings of the States, it is founded on article IV, section 1, of the Constitution; but the power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States; which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the power of the national government within the limits of the Constitution.

Id. at 676. Compare p. 747 *supra*. The statement is only dictum since the *Metcalf* Court, after considering whether or not Wisconsin *could* provide a shorter statute of limitations for enforcement of Wisconsin federal judgments than it did for Wisconsin state court judgments, found by heroic construction that the Wisconsin statute did not so intend. On whether a shorter limitation period for enforcement would be valid, see *Watkins v. Conway*, 385 U.S. 188, 189 (1966) (dictum that state cannot limit its enforcement of sister state judgments to shorter period than that allowed judgments of its own courts).

"implementing" in this respect clauses of the Constitution other than Article IV, § 1, most notably the power to create courts inferior to the Supreme Court. Even more remarkable than this construction of the Constitution and statute is the total silence of the Congress, which has never, even to this day, explicitly addressed the effect to be given federal judgments.

The rule which has become law was stated most recently by Justice Reed in *Stoll v. Gottlieb*.³² The Supreme Court of Illinois had refused to honor the decree of a bankruptcy court in Illinois on the ground (accurate as far as it went) that the decree in question exceeded the bankruptcy court's subject matter jurisdiction. But that objection had been raised and decided, however wrongly, in the bankruptcy court. Reed's opinion says of the implementing statute that it

is broader than the authority granted by Article Four, section one, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. Under it the judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances.³³

The opinion later makes the puzzling suggestion that because there was a federal question involved (bankruptcy), "[t]he problem before the Supreme Court of Illinois was not one of full faith and credit but of *res judicata*."³⁴ Why this should be true is not explained, and the difference, if it is one, is not followed up in other cases.

This survey of the development of the rule has been kept short because its purpose is not to show that the Court was willfully wrong in doing what it did, but to establish that it was wantonly right. By strength of arm and sleight of hand, it achieved a result that is indispensable to federalism. In the words of Chief Justice Stone, the purpose of full faith and credit is to "establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered."³⁵ Like the commerce clause, it "became a nationally unifying force."³⁶ Although Stone was writing in a state-to-state context, the principle is as powerful in state-federal relations. Were there no such rule, it would be necessary to invent one—so invent it the Supreme Court did.

32. 305 U.S. 165 (1938).

33. *Id.* at 170.

34. *Id.* at 171.

35. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

36. *Id.*

The early history of full faith and credit discloses no dispute or confusion arising over federal judgments tendered in other federal courts. The problem, discussed below under the heading "The Effect and Scope of Federal Judgments,"³⁷ was not posed directly until 1931. It is modern law, not history.

II. State Judgments in Federal Courts

I noted in the introduction that the *Erie* decision has given rise to a questionable line of authority. Must a federal court follow the law of the state in which it sits on the scope and effect to be given to that state's own judgments and to the judgments of *other* states? As will be shown, the answer is certainly "yes" to the first and "no" to the second. Yet most of the relevant decisions seem to conclude that there is only one issue presented, and that it is resolved by the *Erie* doctrine. That is erroneous; *Erie* has no voice on the issue, which should be framed in different terms. The correct answer is found in the implementing statute. Fortunately the faulty doctrine is not yet fully entrenched; the Supreme Court has noted the problem, but has not yet ruled on it. And at least a few lower court cases point in the right direction.

The Supreme Court appears to have first taken cognizance of the problem in *Heiser v. Woodruff*.³⁸

We need not consider whether, apart from the requirement of the full faith and credit clause of the Constitution, the rule of *res judicata* applied in the federal courts, in diversity of citizenship cases, under the doctrine of *Erie* . . . can be other than that of the state in which the federal court sits.³⁹

As this quote suggests, the question raised within it was found not to bear on the outcome.⁴⁰ The other Supreme Court notation is much more recent. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*⁴¹ marked the Supreme Court's first consideration of California's abandonment of the traditional requirement of mutuality (identity of parties) for the invocation of collateral estoppel. Noting the

37. See pp. 756-70 *infra*.

38. 327 U.S. 726 (1946).

39. *Id.* at 731-32.

40. A money judgment had been filed as a claim in a bankruptcy proceeding. It was objected that the judgment had been fraudulently obtained (although the issue of fraud itself had previously been litigated and decided). The Court actually ruled that the question was not one of the effect of judgments but of the provability and allowability of claims, matters regulated by the Bankruptcy Act, 11 U.S.C. § 103(a) (1970).

41. 402 U.S. 313 (1971).

trend in the field from Justice Traynor's *Bernhard* decision to the present, the Court said:

Many federal courts, exercising both federal question and diversity jurisdiction, are in accord [on dispensing with mutuality] unless in a diversity case bound to apply a conflicting state rule requiring mutuality.⁴²

Following this statement in *Blonder-Tongue's* text is a string of citations to cases, many of them discussed below, which seem to bear out the principle that federal courts in diversity cases may be required to conform to state law on the scope or effect of a judgment. Nevertheless, this statement in the opinion is certainly not a holding (*Blonder-Tongue* itself arose entirely under federal question jurisdiction—a patent infringement—rather than diversity jurisdiction) and should not even be regarded as dictum. It is merely a factual observation—most federal courts have said that in diversity cases they are bound to apply the law of judgments of the state in which they sit.

This observation leaves open two questions. Are federal courts so bound? And if so, why? The answer to the first question is that federal courts in diversity are bound to reach the same result as the forum state would, but for a reason unrelated to the *Erie* doctrine. The implementing statute from 1790 until today has compelled the federal courts to give to the judgment of the court of any state, not only those of the state in which it sits, the same full faith and credit that the judgment has “by law or usage” in the court of rendition.⁴³ The statute requires similar recognition by any state court. Thus, by the terms of the statute, Pennsylvania courts, both state and federal, must give to New York judgments the effect that New York would give them, not whatever effect Pennsylvania decides they deserve. Similarly, Pennsylvania federal courts must give to Pennsylvania judgments the same effect Pennsylvania would give. Even in this latter case, the reason is not *Erie*,⁴⁴ which most courts cite to support the conclusion, but the full faith and credit statute.

Reference to the *Erie* doctrine in the situation where both state and federal courts are located in the same state can probably be dismissed as a form of harmless error. But there are cases where the error is not harmless, and discussion of but a few will demonstrate why.

42. *Id.* at 325 (footnote omitted).

43. See note 15 *supra*.

44. The Rules of Decision Act provides that state law shall supply the rule of decision in civil actions in federal courts “except where . . . Acts of Congress otherwise require or provide.” 28 U.S.C. § 1652 (1970) (emphasis added). The full faith and credit statute, 28 U.S.C. § 1738 (1970), is of course one such superseding act.

*Behrens v. Skelly*⁴⁵ was a suit in a Pennsylvania federal court upon an arbitration award reduced to judgment in a New York supreme court. The issue was whether the Pennsylvania defendants were in "privity" with the New York litigants. Judge Maris said:

In the present case jurisdiction is based on diversity of citizenship. We must, therefore, determine in accordance with the conflict rules of Pennsylvania what law is to be looked to for ascertaining whether the defendants are in privity with [the New York litigants].⁴⁶

Finding no Pennsylvania conflicts rule about privity, he used the first *Restatement of Conflict of Laws* § 450, comment *d*, as Pennsylvania law; it said, in substance, that the law of the court of rendition determines the question of privity. But he used the *Restatement* as a Pennsylvania conflicts rule, which was entirely beside the point, rather than requiring the federal court to look directly to New York privity law without squinting through the spectacles of Pennsylvania.

A similar holding by another highly respected court in *Eisel v. Columbia Packing Co.*⁴⁷ illustrates the same error. Eisel, who had purchased some packaged ham from a Connecticut retailer, sued the retailer and the Massachusetts packer of the product in a Connecticut state court. The packer pleaded that he had not been properly served with process. Before this could be decided, Eisel chose to proceed with his suit against the retailer and lost upon a finding that the ham had not caused his illness. Thereafter he sued the Massachusetts packer in a Massachusetts federal district court. The packer objected that Eisel was barred by collateral estoppel. Judge Wyzanski said: "This being a diversity jurisdiction case the substantive rules of collateral estoppel are governed by the law of Massachusetts."⁴⁸ Looking at general law, he found a "growing tendency," to which Massachusetts was "hospitable," to apply collateral estoppel against one who had sued another defendant on the same issue in a forum of plaintiff's choice and had, after full and fair trial on the merits, lost.

In this analysis, Homer nodded. Judge Wyzanski should have looked to the law of Connecticut, the state of rendition. On a matter as much in flux in 1960 as the doctrine of mutuality, the result under *Eisel's* approach could have been right only by accident, for Article IV of the Constitution and the implementing statute require Massachusetts

45. 173 F.2d 715 (3d Cir. 1948), *cert. denied*, 338 U.S. 821 (1949).

46. *Id.* at 717.

47. 181 F. Supp. 298 (D. Mass. 1960).

48. *Id.* at 299.

itself to look to Connecticut law. But what Massachusetts may think about mutuality in wholly domestic cases is at best only an indication of what Connecticut would hold. It was Connecticut's "hospitality," not that of Massachusetts, which was crucial.

These two cases can be reinforced by a handful of holdings and a multitude of quotations to the same effect. Those are relegated to the notes⁴⁹ because the point has been made. The approach which relies on *Erie* has become the federal rule. It has been adopted by several circuit courts; the Third Circuit especially, which early adopted the rule abandoning mutuality,⁵⁰ has frequently relied on the *Erie* approach.

Although a substantial majority of federal decisions on this point have followed the *Erie* analysis, at least a handful have not. One excep-

49. Arranged by circuits, the decisions are: *Standard Accident Ins. Co. v. Doiron*, 170 F.2d 206, 207 (1st Cir. 1948); *Ritchie v. Landau*, 475 F.2d 151, 154 (2d Cir. 1973); *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1179 (3d Cir. 1972) (dictum only, since state and federal rules were found to be the same); *Kimmel v. Yankee Lines*, 224 F.2d 644, 645 (3d Cir. 1955); *Blum v. William Goldman Theatres*, 174 F.2d 914, 915 (3d Cir. 1949); *Hornstein v. Kramer Bros. Freight Lines*, 133 F.2d 143, 144 (3d Cir. 1943); *Graves v. Associated Transp. Inc.*, 344 F.2d 894, 896 (4th Cir. 1950); *Breeland v. Security Ins. Co.*, 421 F.2d 918, 921 (5th Cir. 1969); *American Mannex Corp. v. Rozands*, 462 F.2d 688, 689 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972) (with warning that in some unspecified cases "other well-defined federal policies may compete with those policies underlying section 1738"; case may be an amalgam of *Erie* and the implementing statute); *Hackler v. Indianapolis & Southeastern Trailways, Inc.*, 437 F.2d 360, 361 (6th Cir. 1971); *Machris v. Murray*, 397 F.2d 74, 75 (6th Cir. 1968); *Hardy v. Bankers Life & Cas. Co.*, 232 F.2d 205, 208-09 (7th Cir.), *cert. denied*, 351 U.S. 984 (1956) ("Since jurisdiction rests on diversity of citizenship, Illinois law as to defendants' liability governs the decisions in this cause [citing, *inter alia*, *Erie*]. In accord with the Illinois law, we must determine the effect of the judgment under attack by applying the law of Minnesota."); *Gerrard v. Larsen*, 517 F.2d 1127, 1131-32 (8th Cir. 1975) (raises the issue but finds decision of it unnecessary); *R.J. Reynolds Tobacco Co. v. Newby*, 153 F.2d 819, 820 (9th Cir. 1946).

A comprehensive but not entirely reliable annotation in 19 A.L.R. FED. 709 (1974) collects district court decisions as well. An excellent opinion, though wrongly relying on *Erie*, was written by Judge Levet in *Pallen v. Allied Van Lines, Inc.*, 223 F. Supp. 394 (S.D.N.Y. 1963). A Florida state court judgment was invoked as precluding relitigation of several issues. The judge noted, "The determination of which law is to govern . . . begins with the inevitable citation of the *Erie* trilogy." *Id.* at 395. Finding that issue preclusion was outcome determinative and that there was no countervailing federal policy, the court looked to New York law and found that it would apply the collateral estoppel rule of Florida, the state of rendition. Cited in support is RESTATEMENT OF CONFLICT OF LAWS § 450 (1934).

The error in some of the cases here listed may be of the harmless variety because they involved a state judgment called into question in a federal court of the same state. Whether it is *Erie* which controls or full faith and credit, the result would be the same. For example, in the First Circuit decision in *Doiron, supra*, applying an *Erie* analysis may still have given the right result because the state court judgment was pleaded in a federal court of the same state. Perhaps the First Circuit redeemed itself when it used full faith and credit exclusively in *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868 (1st Cir. 1960).

50. *Bruszewski v. United States*, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950).

tion, cases where diversity is not involved, will be discussed later.⁵¹ But a few federal courts have perceived that no *Erie* problem is ever presented, even in diversity. One case came to this position perforce (it was decided prior to *Erie*) and recognized that the only question was one of full faith and credit.⁵² A major post-*Erie* case is *Hazen Research, Inc. v. Omega Minerals, Inc.*,⁵³ where a Colorado state court judgment was sued upon in federal court in Alabama. Ignoring *Erie*, the Fifth Circuit applied a straightforward full faith and credit analysis. "[W]e have the rather anomalous situation of a federal diversity court deciding a controversy in which Congress has, by the exercise of its express and implied powers, federalized all relevant legal questions—a diversity case in which there are no issues of forum state law."⁵⁴ Still another such case comes from the Third Circuit. In *Clyde v. Hodge*,⁵⁵ without citing any of its *Erie*-line cases, the court said:

Unquestionably, the courts of the United States must give full faith and credit to the final judgments of state courts. Constitution of the United States, Article IV, Section 1; 28 U.S.C.A. § 1738; The district court was therefore compelled to give the Ohio judgment the same force and effect in this action as it would have been accorded by the Ohio courts.⁵⁶

In the light of this command, the court held that since Ohio still preserved the rule of mutuality for collateral estoppel, certain issues were not barred in the Pennsylvania federal district court.

Explicit in a few of the *Erie*-based cases,⁵⁷ and implicit in many more, is the notion that the rule of res judicata or collateral estoppel is "substantive" rather than "procedural" for purposes of the *Erie* doctrine. That classification is unimportant in the sense that the application of *Erie* under established case law does not turn on whether the label is substance or procedure. If "outcome determinative" is the relevant test under the Rules of Decision Act as construed in *Erie*,⁵⁸ hardly anything is more dispositive than the doctrine of res judicata.

51. See pp. 759-60 *infra*.

52. *Coppedge v. Clinton*, 72 F.2d 531, 536 (10th Cir. 1934) (citing what is now 28 U.S.C. § 1738 (1970)).

53. 497 F.2d 151 (5th Cir. 1974). Another example is *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868 (1st Cir. 1960).

54. 497 F.2d at 153 n.1.

55. 413 F.2d 48 (3d Cir. 1969).

56. *Id.* at 50.

57. *E.g.*, *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1181 (3d Cir. 1972) (Since mutuality seems outcome determinative, "*Guaranty Trust Co. [v. York]*, 326 U.S. 99 (1945) would seem to require application of the state rule."); *Pallen v. United Van Lines, Inc.*, 223 F. Supp. 394, 395 (S.D.N.Y. 1963).

58. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

But a later section of this article will argue that even the outcome determinative standard is not controlling—federal courts can and should have a rule of res judicata not dependent upon the law of the states in which they sit.⁵⁹ Direct recourse to federal law, which avoids the “outcome” problem, is compelled by the Rules of Decision Act itself.⁶⁰ Under its terms federal courts must follow state rules of decision unless the Constitution, federal laws, or treaties “otherwise require or provide.” The implementing statute, 28 U.S.C. § 1738, does explicitly provide otherwise, and *Erie* is irrelevant.

Some of the cases⁶¹ and literature⁶² touching on this subject have made it appear that there is a delicate balancing problem involved in choosing between *Erie* and full faith and credit. One case that treats this problem does not fall into the trap of balancing, but registers the common uncertainty about the proper choice of the law. In *Gambocz v. Yelencsics*,⁶³ which was not a diversity case, Judge Aldisert said, in a footnote:

Where one or both suits have been brought under federal diversity jurisdiction, the collateral estoppel and *res judicata* laws of the forum state(s) may become applicable through *Erie* . . . , the full faith and credit clause, or 28 U.S.C. § 1738.⁶⁴

There is no such choice and no delicate balance to be struck. Full faith and credit has dominating constitutional and statutory force and must prevail.

III. The Effect and Scope of Federal Judgments

The Supreme Court has held that federal court judgments are entitled to full faith and credit in the states, although, as we have seen, neither the Constitution nor the implementing statute specifies that

59. See p. 769 *infra*.

60. See note 44 *supra*. A special problem with state judgments offered as collateral estoppel in federal courts arises when a state court has incidentally adjudicated an issue which is ordinarily one of exclusive federal jurisdiction. Should the federal court be bound by the state determination? The cases are few in number and inconsistent both in analysis and result. See Comment, *Collateral Estoppel Effect of State Court Judgment in Federal Antitrust Suits*, 51 CALIF. L. REV. 955 (1963); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360 (1967).

61. See, e.g., *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1181-82 (3d Cir. 1972) (choice of state or federal collateral estoppel rule is outcome determinative, but state rule, in giving estoppel effect to arbitration award, would work against “strong federal policy” protecting Seventh Amendment right to jury trial).

62. See Vestal, *Res Judicata Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1726, 1728 (1968); Comment, *supra* note 5, at 97-98.

63. 468 F.2d 837 (3d Cir. 1972).

64. *Id.* at 841 n.4.

result in so many words. The Court also has told us in *Baldwin v. Iowa State Traveling Men's Association*,⁶⁵ that full faith and credit does not control when federal judgments are tendered as causes of action or pleas in bar in other federal courts,⁶⁶ but that the doctrine of res judicata does.⁶⁷ The results are seemingly the same as if full faith and credit did apply.

A doctrine that a judgment is binding, however, does nothing to delineate its scope. There remains the question of what issues, and what persons, are concluded or bound. The answer to this question has varied through three stages. The first stage, of pre-Rules conformity, is now pure history. The second was established not long ago but is now in decline; the third is still emerging with contours far from clear.

To describe the first figuration involves some repetition of the inquiry of Part I. The earliest analyses of the scope of federal judgments concerned judgments of the then federal circuit courts tendered in courts of the state in which the federal court sat. The holdings about the scope or effect of such judgments were clear—the federal judgment had to be treated as neither less *nor more* binding than those issued by the courts of the state.

Thus, in *Dupasseur*, a diversity judgment by a federal court sitting in Louisiana could be given no greater binding effect in subsequent Louisiana litigation than the judgment of a Louisiana state court.⁶⁸ The reason given? Since the case was grounded in diversity,⁶⁹ the federal court's proceedings

were had in accordance with the forms and course of proceedings in the State courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances.⁷⁰

What seemed so "apparent" to Justice Bradley in *Dupasseur* that he cited no supporting authority is less clear to a modern reader. Undoubtedly his conclusion was influenced by the provisions of the Conformity Act then in force. Since all the rules of practice and procedure of the federal courts were the same as those of the states in which they

65. 283 U.S. 522 (1931).

66. *Id.* at 524.

67. *Id.*

68. See pp. 745-46 *supra*.

69. However, see note 20 *supra*.

70. 88 U.S. at 135.

sat,⁷¹ a federal judgment quite naturally would bind the same parties (this was the issue in the case) as would be bound by a state judgment. *Crescent City Live Stock Co.* approached the same limit from the other side, mandating that federal judgments not be given *less* effect in subsequent state court litigation than were state court judgments.⁷²

*Hancock National Bank v. Farnum*⁷³ repeated these conclusions, but in a different context. Suit had been brought in a Rhode Island state court on a judgment from a federal court in Kansas. The issue was whether the federal decision (that a corporation owed a specific debt) was binding upon an assessable shareholder (one whose potential liability did not lapse with the exhaustion of the company's assets) even though the shareholder had not been joined as a party in the original suit. The Court found the answer in Kansas law governing the scope of Kansas state judgments. It then said: "The fact that this judgment was rendered in a court of the United States, sitting within the State of Kansas, instead of one of the state courts, is immaterial . . ."⁷⁴ In explanation the Court merely cited to *Crescent City Live Stock Co.*⁷⁵ This was the state of affairs in 1900. The rule was clear, but the reasons given differed.

There the matter seems to have slumbered, at least at higher appellate levels, until the great change of 1938, when the implementation of the Federal Rules of Civil Procedure and the nearly simultaneous decision in *Erie* overthrew previous patterns and expectations. This transformation opened the second stage of the doctrine of full faith and credit mentioned above. Federal practice came to differ from that of nearly all the states, and the earlier arguments for recognition of federal judgments based on conformity lost their force.

Judge Goodrich appears to have been the first to notice the effect of this change, albeit imperfectly. In *Caterpillar Tractor Co. v. International Harvester Co.*,⁷⁶ decided in 1941, International had conducted the defense of an action brought against another company for patent infringement in federal district court in Nevada. In a second suit for infringement, this time against International itself in a federal district

71. See C. WRIGHT, *supra* note 16, at 256-57. But see note 20 *supra*.

72. See pp. 747-48 *supra*.

73. 176 U.S. 640 (1900).

74. *Id.* at 645. Professor Paul Carrington has suggested that the proper basis for this decision is found not in Kansas's law of res judicata but in its business corporations act. See Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 383 (1963). This conclusion seems to confuse a substantive rule, which perhaps Rhode Island should follow, with an adjudicative determination which Rhode Island was obliged to honor under full faith and credit.

75. See 176 U.S. at 645.

76. 120 F.2d 82 (3d Cir. 1941).

court in New Jersey, Caterpillar urged that International was barred by its earlier unsuccessful (and concealed) defense in Nevada. Judge Goodrich saw that the answer was far from obvious in the light of recent developments:

An interesting intellectual question is presented concerning the theoretical basis for the effect to be given the judgment of a federal court in Nevada in a federal court in New Jersey.⁷⁷

The holding of the case is inconclusive; the decision is obsolete and implicitly overruled. But the analysis remains fundamentally important. The court considered first the possibility that "the question [was] essentially one of faith and credit."⁷⁸ Since *Erie* had left little scope for a federal general common law, Goodrich reasoned, the scope of the judgment had to be determined by the law of some state. Under *Hancock National Bank*, that lawgiver had to be Nevada, in which the original federal court sat.⁷⁹ "On the other hand," his opinion went on, the case involved a *federal* adjudication tendered in another federal court.

[T]he matter here is one between two courts of the same sovereignty, the United States of America. If one federal court failed to give effect to the judgment of another federal court the Supreme Court of the United States, as the head of the judicial system of the United States would compel it do so because "they are many members yet but one body."⁸⁰

Although not citing it, the court must have meant that *Baldwin* would require that conclusion.

The holding in *Caterpillar Tractor* does not conclude whether the common sovereignty of the two federal courts gives rise to a federalized rule on the scope of judgments, for Judge Goodrich found that the same result would occur under the law of preclusion of Nevada and of the federal courts. He did note, however, that Judge Biggs, a member of the panel, thought that faith and credit did not apply.⁸¹

What was the American Law Institute doing in the area of res judicata around the time of *Erie*—faithfully restating the law? Two of its works are pertinent. The *Restatement of Judgments*, issued in 1942,

77. *Id.* at 85.

78. *Id.*

79. "A judgment rendered by a federal court is entitled to the same faith and credit as one rendered by the court of the state where it is sitting." *Id.*

80. *Id.* at 86.

81. "Judge Biggs believes . . . that the recognition in one federal court of the decrees of another comes through the fact that both courts are arms of the same sovereignty." *Id.*

treats in considerable detail the credit to which judgments are entitled, but "deals primarily with the effect of a judgment in the State in which it was rendered and only incidentally with the effect in other States."⁸² One turns to the original *Restatement of Conflict of Laws*, issued in 1934, only to be left uncertain as to whether it was intended to cover federal judgments at all. The only seemingly applicable provision is Title C, *Res Judicata and Merger*, § 450, discussing the "Effect of Valid Foreign Judgment," which indicates that the issues decided by a judgment and the parties bound by it are "determined by the law of the state where the judgment was rendered."⁸³ The Comments and Illustrations are phrased wholly in terms of state practice. There is no separate mention of federal adjudications. Still, the rule was an accurate restatement because, as has been shown, before 1938 the scope of a federal judgment was determined by the law of the state in which it was rendered. Yet nothing in either Restatement denies the possibility that comprehensive federal principles, derived from existing law, might govern the effect of all judgments in all courts.

Before reviewing the case law subsequent to *Caterpillar Tractor*, it might be well to consider a question neither asked nor answered by Judge Goodrich and not reached by the Restatements: Why should Nevada law have *any* influence on the effect of a judgment for patent infringement, a subject of exclusive federal jurisdiction? What does it matter what Nevada might wish to do in an area in which the state has no power to act? In defense of Judge Goodrich, it should be noted that he offered the suggestion that the state rule on judgments must prevail only as a possibility. But he developed it with enough clarity to attract many followers, while the other possibility—that the problem should be solved by considering only the structure of the federal courts themselves—is expressed obscurely, although I believe it is ultimately sounder.

Judge Goodrich's view of the possible consequences of *Erie* for the recognition of judgments did not survive, at least not in cases of exclusive federal jurisdiction. In *Heiser v. Woodruff*,⁸⁴ where a federal diversity judgment was filed as a claim in bankruptcy, the Supreme Court said: "It has been held in non-diversity cases, since *Erie v. Tompkins*, that the federal courts will apply their own rule of res

82. RESTATEMENT OF JUDGMENTS, Scope Note, at 2 (1942). To the same effect and more explicit is RESTATEMENT (SECOND) OF JUDGMENTS 20 (Tent. Draft No. 1, 1973). It restricts itself to "the res judicata effects of a judgment upon later actions in the courts of the same State. Effects in the courts of a sister State are dealt with in *Restatement (Second) of Conflict of Laws* §§ 93-121."

83. RESTATEMENT OF CONFLICT OF LAWS § 450, at 533-34 (1934).

84. 327 U.S. 726 (1946).

judicata.”⁸⁵ At least in matters of exclusive federal jurisdiction there is no need even to measure the force of the authorities cited by the *Heiser* Court;⁸⁶ the existence of a distinctly federal rule of res judicata in cases of exclusive federal jurisdiction was reconfirmed in 1971 by *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.⁸⁷ Like *Caterpillar Tractor*, *Blonder-Tongue* was a patent infringement suit.⁸⁸ The holding—that mutuality of parties is not required for collateral estoppel—relies exclusively on federal policy and attaches no importance whatever to the law of the state in which the first patent suit was brought.

Williamson v. Columbia Gas & Electric Corp.,⁸⁹ decided by the Third Circuit in 1951, marks the beginning of the third stage of evolution. Two suits had been brought in the federal district court in Delaware. They involved the same parties and rested on substantially the same facts, but one invoked the Sherman Act and the other the Clayton Act. Without even a passing inquiry about whether Delaware law would allow a claim to be split when it was supported by two different legal theories, Judge Goodrich advanced an expanded rule of res judicata to preclude the second action. He justified the change from the older rule of allowing narrowly posed single issues to constitute separate causes of action by citing a “modern” preference for disposition of the whole controversy between parties.⁹⁰ For present purposes, the importance of the decision is not that Judge Goodrich chose to be modern, but that he perceived res judicata as a distinctly federal problem, not in any way dependent upon the law of the state in which the federal court sat.

The shift marked by the *Williamson* case is significant and takes into account another major development occurring around 1938—the end of conformity and the adoption of independent federal rules of procedure under the Rules Enabling Act.⁹¹ In *Williamson*, after explaining that older views on splitting causes of action had been shaped

85. *Id.* at 733.

86. *Jackson v. Irving Trust Co.*, 311 U.S. 494, 503 (1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403 (1940).

87. 402 U.S. 313 (1971).

88. The specific issue in *Blonder-Tongue* was slightly different from *Caterpillar Tractor*: whether a party who had litigated and lost could relitigate against another plaintiff an issue resolved in the prior proceeding.

89. 186 F.2d 464 (3d Cir.), *cert. denied*, 341 U.S. 921 (1951).

90. *Id.* at 470.

91. The Conformity Act of June 1, 1872, ch. 255, 17 Stat. 196 was repealed in 1934 by the Rules Enabling Act, ch. 651, 48 Stat. 1064 (now codified at 28 U.S.C. § 2072 (1970)).

by the then prevailing law on pleading and joinder, Judge Goodrich stated that the principle of disposing of the whole controversy between parties "pervades the modern systems of pleading, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims."⁹² What provisions of the Federal Rules of Civil Procedure speak to the problem of preclusion? Most importantly, Rules 13(a) and 41(b): the former precludes subsequent litigation of a counterclaim arising out of the same transaction as the main claim, except under stated circumstances; the latter provides that a dismissal of an action is to be deemed to be an adjudication on the merits (thereby precluding further action) unless the dismissal order otherwise specifies.

There are fully established lines of decision on both of these rules that the federal determination is binding not only in other federal courts but also in the courts of the states. For the counterclaim rule, it is enough to mention *London v. Philadelphia*,⁹³ where the Pennsylvania supreme court held that a party was precluded by prior litigation in a federal court in which the party could have asserted a counterclaim, but did not.⁹⁴ The nearly uniform course of state court decisions accepting preclusion of counterclaims not timely made as a matter of substantive federal law is adequately chronicled elsewhere.⁹⁵

The settling effect of a federal dismissal with prejudice is also fully established. The first decision is that of Judge Medina in *Kern v. Hettinger*,⁹⁶ a case originating in the Southern District of New York. The plaintiff had previously sued one of the defendants in federal district court in the Northern District of California on the same claim, and the suit had been dismissed there under Rule 41(b) for want of prosecution. Kern argued that the California dismissal was without prejudice because that would have been the effect of dismissal in a California state court. Judge Medina replied:

92. 186 F.2d at 470.

93. 412 Pa. 496, 194 A.2d 901 (1963).

94. *Id.* at 499, 194 A.2d at 902. The basis of the holding is not entirely clear, but the court appears to treat the res judicata effect as a matter of substantive federal law:

We realize that Pennsylvania state court trials are not bound by federal court procedural rules. But, this is not now a matter of procedural rules, but rather the application of substantive law. The principle of res adjudicata is controlling.

Id. at 500, 194 A.2d at 902. *Accord*, *Horne v. Woolever*, 170 Ohio St. 178, 163 N.E.2d 378 (1959), *cert. denied*, 362 U.S. 951 (1960).

95. See 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1417, at 102 (1971) ("[S]tate courts generally have adopted the approach of treating the barring effect of the rule as substantive and have declined to hear any claim not pleaded in a prior federal action as required by Rule 13(a)."); Comment, *supra* note 5, at 108-10.

96. 303 F.2d 333 (2d Cir. 1962).

We disagree. One of the strongest policies a court can have is that of determining the scope of its own judgments. . . . It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. . . . But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts The Erie doctrine . . . is not applicable here; and the judgment in favor of [this defendant] is affirmed.⁹⁷

A similar effect can be attributed to Rule 15, dealing with amendment, and Rule 18, dealing with the permissible joinder of claims. An illustration is *Glick v. Ballentine Produce, Inc.*,⁹⁸ although the discussion therein is inadequate. In earlier litigation, the plaintiffs had sued in an Arkansas federal court for damages for wrongful death arising out of a collision in Missouri, seeking recovery under Arkansas common law. The action was transferred to Missouri where the district court ruled that Missouri law applied and that the plaintiffs failed to state a claim under that law; the court gave leave to amend, but the plaintiffs elected to suffer a dismissal under Rule 41(b), which was stated to be "with prejudice."⁹⁹ On appeal the dismissal was affirmed, and their petition for certiorari denied.¹⁰⁰ Thereafter, they began a second action in Missouri federal court under the Missouri wrongful death statute, which they had deliberately foregone earlier because that statute was least favorable for their recovery. The action was dismissed on a plea of res judicata, and the Eighth Circuit affirmed, holding that a dismissal with prejudice was a ruling on the merits both under Rule 41(b) and the Missouri rules.¹⁰¹

Perhaps the case is only another application of Rule 41(b). More important, however, is what was not said. What claims are precluded by dismissal? Is it only those actually stated and dismissed, or also those one might have added by amendment but elected not to? The Eighth Circuit might have looked to Missouri law for the answer, but it did not. Implicit in the case is the determination that what con-

97. *Id.* at 340. *Accord*, *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1275 (2d Cir. 1974) ("This would be so whether the suit were treated as being based on diversity of citizenship or federal question jurisdiction." (citations omitted)); *Gambocz v. Yelencsics*, 468 F.2d 837, 840 (3d Cir. 1972).

98. 397 F.2d 590 (8th Cir. 1968).

99. *Glick v. Ballentine Prod., Inc.*, 343 F.2d 839, 840-41 (8th Cir.), *cert. denied*, 382 U.S. 891 (1965).

100. *Id.*

101. 397 F.2d at 592.

stitutes a single claim is determined solely by federal law and that a plaintiff's failure to make use of Federal Rule 15 (allowing the amendment of pleadings) so as to state a valid claim bars any subsequent action.

It can also be suggested that Rule 23 on class actions clearly contemplates a uniform federal rule on who is bound by such a suit. Although class actions always have been recognized¹⁰² as an exception to the general rule that only named parties to an action are bound, Rule 23, as amended in 1966, moved further yet—establishing that even in class actions in which members of the class are united in interest only by the presence of common questions in their claims, they are bound unless they affirmatively opt out of the suit.¹⁰³ And courts appear ready to uphold this principle.¹⁰⁴

To the extent, then, that the Federal Rules of Civil Procedure do speak about the preclusive effect of federal adjudications, they speak authoritatively, and determinations based upon them are entitled to res judicata effect or full faith and credit.¹⁰⁵ They have been given that effect by state and federal courts alike.

What happens, however, on matters of res judicata where the Supreme Court has not exercised its rulemaking power under the Enabling Act? Can the federal courts, lower as well as Supreme, adopt theories of res judicata which are different not only from their own prior rules on these subjects but also from those of the states in which the rendering court sits?

I noted at the outset of this article that four developments in the past generation have left the federal law of res judicata uncertain. The Federal Rules of Civil Procedure have been discussed, and *Erie* is at least partially disposed of. What of the other two—the changing conception of the scope of a cause of action and the relaxed views about mutuality of estoppel first announced by the California Supreme Court in *Bernhard*?¹⁰⁶ Neither of these is treated in the Federal Rules.

Certainly there are holdings, explicit and implicit, that federal courts can create rules on the scope of a cause of action (what issues have been decided, even if not actually litigated) and on the parties

102. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

103. See 7A C. WRIGHT & A. MILLER, *supra* note 95, § 1789 (1972).

104. See *In re Four Seasons Sec. Laws Litigation*, 493 F.2d 1288 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974); Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974).

105. There is support for this principle in *Hanna v. Plumer*, 380 U.S. 460 (1965). See C. WRIGHT, *supra* note 16, § 59.

106. *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

bound by an adjudication. The *Williamson* case¹⁰⁷ is one example; the court was clearly influenced by the overall tenor of the Federal Rules, but did not apply any particular Rule. Rule 18, allowing free joinder, is most nearly on point; but it only permits and does not compel. *Williamson* introduced a principle of compulsory joinder, a rule against splitting claims into as many causes of action as there are legal theories to support recovery on the same set of facts. Much the same can be said of *Glick*.¹⁰⁸ Rule 15 permits amendment, but does not purport to require amendment. Only judicial construction in light of broader policy prevents splitting claims and compels one to amend when the opportunity is afforded.

Not surprisingly, it has been in diversity cases that federal courts have been least confident of their power to declare a general federal rule of *res judicata*. The *Glick* case, applying a federalized rule of compulsory amendment, arose under straight diversity jurisdiction, but the court did not address the possible limiting effect of diversity jurisdiction. Where courts have perceived the problem, it has been a source of confusion, as is revealed in two airline disaster cases. One is *United States v. United Air Lines, Inc.*¹⁰⁹ where a district court was specially constituted as a court for the District of Nevada and the Eastern District of Washington, but eventually tried the case in the District of Nevada because the air collision sued upon had occurred there. After an extensive trial involving large claims, a jury found United Air Lines liable for the death of many passengers. Thereafter, representatives of the remaining passengers moved for summary judgment on liability, which was granted. The trial court found it difficult to decide which law of mutuality applied, but settled upon that of Nevada; it concluded that the collateral estoppel rule was substantive and that Nevada, as the site of the collision, was the proper source for substantive law.¹¹⁰ Wishfully, the court found that Nevada had abandoned mutuality as early as 1916, long before the *Bernhard* revolution, and then advanced the more comforting authority of *Bernhard* itself, which Nevada presumably would have followed in any event.¹¹¹ Despite this reliance on state law, there is at least an intimation that the judge considered the matter one of federal law, for he collected federal cases

107. See pp. 760-61 *supra*.

108. See p. 762 *supra*.

109. 216 F. Supp. 709 (D. Nev., E.D. Wash. 1962), *aff'd sub nom.* *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed under S. Ct. R. 60*, 379 U.S. 951 (1964).

110. 216 F. Supp. at 726.

111. *Id.*

holding that the requirement of mutuality no longer prevailed in federal courts.¹¹²

Another puzzling opinion is *Berner v. British Commonwealth Pacific Airlines, Ltd.*,¹¹³ a case brought in the Southern District of New York for the wrongful death of a passenger who died in a crash near San Francisco. The trial judge directed a verdict against the airline on the basis of a prior California federal court judgment in favor of the survivors of another passenger on the same flight. On appeal, the Second Circuit first distinguished its own decision in *Zdanok v. Glidden Co.*¹¹⁴ that dispensed with an absolute requirement of mutuality: "Zdanok involved two federal court cases resting on federal question jurisdiction. We have two federal court cases here, but in both jurisdiction rests on diversity of citizenship."¹¹⁵ "[I]n light of the radiations of *Erie R.R. v. Tompkins*," the opinion went on, the court "might properly look initially to New York law," which then still required mutuality.¹¹⁶ The circuit court finally saved itself from a difficult choice by finding, on dubious grounds, that the results under the federal, New York, and California rules were all the same.¹¹⁷

The Third Circuit has faced the same problem. It had early rejected the requirement of mutuality in cases involving federal questions. However, in *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mutual Casualty Co.*,¹¹⁸ a diversity case, the court ruled that it was bound to apply Pennsylvania law on collateral estoppel (which also rejected mutuality) to a prior Pennsylvania federal judgment. What seems the most recent and most difficult case from the Third Circuit is *Williams v. Ocean Transport Lines, Inc.*¹¹⁹ A longshoreman sued a port commission in diversity in the federal district court for New Jersey and simultaneously sued the shipowner in admiralty in federal district court in the Eastern District of Pennsylvania. Liability was not seriously in dispute. The New Jersey judgment was rendered first, with a verdict for \$90,000. Not satisfied with the amount, the plaintiff pursued his Pennsylvania action seeking greater damages. The insurance company representing both defendants raised the defense of collateral estoppel in the Pennsylvania federal court. The court noted a number of possible solutions to the choice of law problem. One

112. *Id.* at 728.

113. 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

114. 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

115. 346 F.2d at 539.

116. *Id.*

117. *Id.* at 541.

118. 411 F.2d 88 (3d Cir. 1969).

119. 425 F.2d 1183 (3d Cir. 1970).

might look to the law of New Jersey to determine the preclusive effect of the earlier judgment, since it had been rendered by a federal diversity court sitting in New Jersey—as we have seen, this was once the iron-clad rule. Or instead, one might look to “the law applicable to the second suit to determine what preclusionary effect should be given in that suit to the first judgment.”¹²⁰ The choice of this second alternative would not, however, end the inquiry: one still would have to determine whether “the law applicable to the second suit” was the law of the forum state, because of *Erie*, or whether the federal court was “free in the light of federal considerations to apply its own rule.”¹²¹ After an extensive and sophisticated discussion of the principles involved, the court looked to federal policy:

Where so substantial a federal interest is involved as the multiplicity of claims arising out of seamen's and longshoremen's accidents, a federal court should be able to decide for itself whether or not a greater preclusionary effect may be given to a prior judgment than would be given in the state of the first forum. . . . This same consideration eliminates the necessity for looking to Pennsylvania law, at least where the second action asserts federal subject matter rather than diversity jurisdiction.¹²²

This approach to the resolution is unnecessarily complicated. Further, it is wrong. Instead of engaging in the dubious inquiry whether “federal interests” were “substantial” enough to justify giving greater effect to the prior adjudication “than would be given in the state of the first forum,” the court should simply have ruled that the scope of the New Jersey diversity judgment was necessarily determined by federal law, not New Jersey law.

So bold an assertion may call both for authority and some explanation. One recent decision, *Aerojet-General Corp. v. Askew*,¹²³ holds unqualifiedly that there is a federal rule against splitting claims (in this instance failing to raise a federal defense when it could have been asserted) and that the question of what parties are bound by a judgment is also federal in nature. There had been federal litigation over the validity of an option held by Aerojet to buy certain public lands. This first suit was in a federal diversity court, although there existed

120. *Id.* at 1187.

121. *Id.* at 1188.

122. *Id.* at 1189-90 (emphasis added). One commentator has criticized *Williams's* use of a federal rule giving greater faith and credit to a judgment than would be given in the state of rendition, suggesting that it would have been preferable to “anticipate” New Jersey rulings loosening the old requirement of mutuality. 56 VA. L. REV. 1483, 1485 (1970).

123. 511 F.2d 710 (5th Cir.), *appeal dismissed and cert. denied sub nom. Metropolitan Dade County v. Aerojet-General Corp.*, 423 U.S. 908 (1975).

a potential defense that invoked a federal question (whether the option was invalidated by a Florida statute later enacted, or whether such invalidation would violate the contracts clause). The only defense pleaded and tried was failure of consideration. Thereafter, the same issues were raised between different parties in a Florida state court. An injunction was sought in federal court, under federal question jurisdiction, to prevent further prosecution of the Florida action.¹²⁴ The party opposing the injunction claimed that the scope of the earlier federal diversity judgment was governed by Florida case law. The district judge apparently conceded that Florida law defined the scope of the federal judgment.¹²⁵ The Fifth Circuit held, however, that "federal rather than state standards are applicable":

Federal law clearly governs the question whether a prior federal court judgment based on federal question jurisdiction is res judicata in a case also brought, as this one was, under federal question jurisdiction. We believe the same result obtains where, as in this case, the first suit was brought only under diversity jurisdiction. The federal doctrine of res judicata bars relitigating any part of the cause of action in question, including all claims and defenses that were actually raised or could have been raised.¹²⁶

In addition to the question of what claims were foreclosed by the first judgment, there was a problem of parties. A state land board had been the party defendant in the original federal litigation. Dade County, which wanted to purchase the land and had a priority under the challenged Florida statute, argued that it could not be bound by litigation to which it was not a party. To this contention also the court found an answer in federal law:

Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.¹²⁷

124. The issue of full faith and credit is usually raised by suing on a judgment as an obligation or by pleading it in bar. But it is established that a federal court may enjoin the bringing of a state action when a prior federal judgment would constitute a bar. This is deemed within the exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1970), permitting a federal court to enjoin state proceedings when necessary "to protect or effectuate its judgments." *See, e.g.,* *Cliett v. Hammonds*, 305 F.2d 565 (5th Cir. 1962); *Lee v. Terminal Transp. Co.*, 282 F.2d 805 (7th Cir. 1960), *cert. denied*, 365 U.S. 828 (1961).

Would a state decision denying a plea of res judicata or full faith and credit be a final order prior to trial on the merits and be subject to certiorari under 28 U.S.C. § 1257 (1970)? A persuasive argument that it is was made in Petitioner's Brief for Certiorari at 2-6, *Hughes v. Trans World Airlines, Inc.*, 336 A.2d 572 (Del.), *cert. denied*, 423 U.S. 841 (1975).

125. 366 F. Supp. 901, 908 (N.D. Fla. 1973).

126. 511 F.2d at 715 (footnote omitted).

127. *Id.* at 719.

The court concluded that identity of interest was principally a question of fact and did not disturb the trial court's finding.

Aerojet-General deserves to be admired, but not beatified. In one of the footnotes there is the dubious suggestion that, although the res judicata effect of federal judgments is a matter of federal law, collateral estoppel may somehow be determined by the law of some state.¹²⁸ Yet once established, as it has been, that the full faith and credit statute does apply to federal judgments, there seems to be no reason to select among the res judicata features, measuring some by federal law and others by state law. Another footnote advances the view that where a federal court judgment based on diversity jurisdiction is pleaded as res judicata in a subsequent state court action, the law of the original forum state would govern as to whether the federal judgment has preclusive effect.¹²⁹ This was an attempt to limit the holding of *Aerojet-General* to instances where federal judgments are pleaded as res judicata in subsequent federal suits, thus seemingly preserving the authority of *Dupasseur*¹³⁰ and *Crescent City Live Stock Co.*¹³¹ In fact, as has been shown, those cases have been superseded by the development of independent federal rules of procedure.¹³² They are not good statements of the emerging law, and would be better abandoned than distinguished. Federal judgments should be given the "same full faith and credit in every court . . . as they have by law or usage" in the court of rendition.¹³³

The argument in support of this conclusion is abstract, and requires a cautious statement. At its root is the constitutional provision that the federal judicial power extends only to cases and controversies. To decide a case or controversy implies some binding effect. A judgment or decree that lacked finality would constitute something other than

128. *Id.* at 716 n.8. One of the cases discussed is *Berner v. British Commonwealth Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966). See p. 763 *supra*.

129. [A]voiding state court bias is a major purpose of diversity jurisdiction and an important reason for applying federal law to determine whether a prior federal court diversity judgment is res judicata in a subsequent diversity case. It should be noted that our holding accomplishes that purpose without intruding into the legitimate domain of state law under the *Erie* doctrine. Where a federal court judgment based on diversity jurisdiction is pleaded as res judicata in state court, the danger of state court bias causing untoward effects on the integrity of federal court judgments is minimal. If bias were a problem one party or the other would have filed the suit in federal court or removed it there. Accordingly, state law has been held to govern whether a federal court diversity judgment is res judicata in a subsequent state court action.

511 F.2d at 717-18 n.9 (citing *Dupasseur* and *Crescent City Live Stock Co.*).

130. See pp. 745-46, 756-57 *supra*.

131. See pp. 747-48, 757 *supra*.

132. See, e.g., p. 761 *supra*, note 140 *infra*.

133. 28 U.S.C. § 1738 (1970) (emphasis added).

an exercise of the judicial power.¹³⁴ If that principle be accepted (and it has rarely been denied), it seems inappropriate that some other sovereignty—the states—should have ultimate authority to determine *what* binding effect the judgment has and on whom.

There may have been merit, when the Conformity Act prevailed, in following, within limits, state law on the effect of judgments. The proper scope of judgments is determined in large part by the procedures leading to their rendition. Thus it was not unreasonable to declare that federal judgments should have the same scope, neither more nor less, as judgments rendered by the courts of the states wherein they sat, if only as a matter of Congress's power to regulate the jurisdiction and procedure of federal courts. But the time of conformity is past. Except by special incorporation of state law, federal procedure under the Rules is independent of the states. That there is still some deference to state law cannot be denied. Rule 4, which serves to define who may be bound by a federal adjudication, partially incorporates state methods of service of process. But in the absence of such restraints, federal law (judge-made when the Rules do not speak) should prevail. The specter of *Erie* should be banished from this realm.

The ultimate reason for this conclusion is that it is in the nature of the judicial power to determine its own boundaries. This principle was recognized by Judge Medina in *Kern v. Hettinger*,¹³⁵ in the very context we are considering here: "One of the strongest policies a court can have is that of determining the scope of its own judgments."¹³⁶ Without that power it is less than a court. The clear thrust of the Constitution is that courts created by the Congress are courts in the fullest historical sense of the word. It is for that reason that we need not look to see whether Congress has enacted an explicit rule on judgments,¹³⁷ or even delegated a power to do so. The only possible limitation of federal courts' power to give force to their own adjudications would arise if the Congress had acted affirmatively and unequivocally

134. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 16, at 85-102.

135. 303 F.2d 333 (2d Cir. 1962). See pp. 761-62 *supra*.

136. 303 F.2d at 340.

137. Though there is no federal legislation on the res judicata effect of judgments, Congress has legislated on a collateral problem. Under 28 U.S.C. § 1962 (1970), a federal judgment has the same lien effect as a judgment of the state in which the federal court sits. Missouri had once attempted to place a slightly onerous but eminently reasonable burden on federal judgments—requiring by statute that a federal judgment be docketed in county records before it became a lien on land located in that county. The Supreme Court emphatically denounced this attempt to give any lesser effect to a federal judgment than would be given to one of a Missouri court, which became a lien upon rendition. "Merely approximate conformity with reference to such a subject matter will not do, especially where complete conformity is entirely possible." *Rhea v. Smith*, 274 U.S. 434, 442 (1927).

to reduce it. Perhaps the Congress could, but that issue need not be faced until an attempt is made. None has been.¹³⁸

Except in *Aerojet-General*, the questions just discussed concerning the issues foreclosed and the parties bound by a federal judgment arose in a purely federal-to-federal context. What have state courts done when federal judgments from the same state are tendered before them as claims or defenses? Not infrequently they simply cite their own decisions on what issues are precluded or parties bound.¹³⁹ This is not surprising; for 100 years, since *Dupasseur* and *Crescent City Live Stock Co.*, the Supreme Court has held that the scope of a federal judgment is determined by the law of the state in which it was rendered, and it has yet to declare that this is no longer the law. Still, in the period following the adoption of the Federal Rules of Civil Procedure, state courts confronted with differences in procedures that might affect who was bound or what was decided have often deferred to the federal rule.¹⁴⁰

Even on matters not covered by the Federal Rules, some state courts have felt bound to give the same preclusionary effect to federal judgments as would a federal court—even where similar preclusion by wholly domestic judgments would be distasteful. Thus in *Shell Oil Co. v. Texas Gas Transmission Corp.*,¹⁴¹ a Louisiana court accepted “with extreme reluctance” what was to it the foreign doctrine of collateral estoppel because it “is included within the full faith and credit man-

138. To treat the effect of diversity judgments as a matter amenable to rulemaking by the federal courts is not inconsistent with the command of the Rules of Decision Act that the “laws of the several states . . . be regarded as rules of decision.” 28 U.S.C. § 1652 (1970). By the terms of the Act, state rules of decision are applicable only where there is no constitutional or statutory requirement to the contrary, and only “in cases where they apply.” That the power to decide the force of federal adjudications is, *in extremis*, a defining element of Article III judicial power gives reason to find that even in less extreme instances the laws of the several states do not “apply” within the terms of the Rules of Decision Act itself.

139. See, e.g., *New Orleans & N.R.R. v. Gable*, 252 Miss. 605, 611, 172 So. 2d 421, 423 (1965); *Williams v. Miller*, 58 N.M. 472, 478, 272 P.2d 676, 680 (1954); *McCarthy v. State*, 1 Utah 2d 205, 207, 265 P.2d 387, 389 (1953).

140. See *Hathcock v. Mitchell*, 277 Ala. 586, 593-94, 173 So. 2d 576, 583 (1965) (co-defendants in prior federal action who had not cross-claimed are not barred because cross-claims are only permissive under Rule 13(g)); *Gish Realty Co. v. Central City*, 260 S.W.2d 946, 951 (Ky. Ct. App. 1953) (co-defendants who had cross-claimed in prior federal case were bound even though Kentucky law did not utilize cross-claims). See also *Salazar v. Murphy*, 66 N.M. 25, 340 P.2d 1075 (1959) (federal court’s dismissal with prejudice of third-party complaint because of plaintiff’s failure to prosecute does not bar plaintiff’s action in state court against a third-party defendant; complaint in prior federal action could not be treated as amended under Rule 15(b) to include claim against third-party defendant, because there had been no trial on the merits).

141. 176 So. 2d 692 (La. Ct. App. 1965).

date of the statute [28 U.S.C. § 1738]."¹⁴² In *Thompson v. D'Angelo*,¹⁴³ the Delaware supreme court extended the Third Circuit's rule (itself erroneous) on federal-federal preclusion to a federal-state context, giving the same collateral estoppel effect, per *Provident Tradesmens Bank*, to a decision of the federal district court for the Eastern District of Pennsylvania "as would be given to it by a Pennsylvania Court."¹⁴⁴

A final question relating to federal judgments tendered in state courts arises in connection with pendent jurisdiction. The doctrine was first established, in a narrow form, during the 1930's.¹⁴⁵ This may again have been an accident of timing, but it is certainly no accident that pendent jurisdiction has been expanded since, and that claims which once could not be pleaded pendent to a federal cause now can be.¹⁴⁶ This development parallels the broadening of the scope of a cause of action described by Judge Goodrich in *Williamson*¹⁴⁷ and, in greater detail, by the tentative drafts of the *Restatement (Second) of Judgments*.¹⁴⁸ There is one seemingly unassailable holding in regard to preclusion of pendent claims, by the supreme court of Pennsylvania in *London v. Philadelphia*¹⁴⁹—that if a state cause of action is a compulsory counterclaim within pendent or ancillary jurisdiction in a federal suit, it is barred in all subsequent litigation, even though it was not presented. In *London*, however, the assertion of the counterclaim was made compulsory by Rule 13(a).¹⁵⁰ Does a similar rule apply to the splitting of claims in instances where joinder is permissive?

142. *Id.* at 696-97. On rehearing, the decision was vacated on the ground that the issue on which preclusion had been applied was one of law rather than of fact. There is an excellent treatment of the case and the problem in 40 TUL. L. REV. 934 (1966).

There have been suggestions in the literature that collateral estoppel (issue preclusion) is less rigidly incorporated into full faith and credit than is res judicata (claim preclusion). See Carrington, *supra* note 74; Note, *Sentencing in Cases of Civil Disobedience*, 68 COLUM. L. REV. 1590 (1968).

143. 320 A.2d 729 (Del. Super. Ct. 1974).

144. *Id.* at 734.

145. *Hurn v. Oursler*, 289 U.S. 238 (1933). See C. WRIGHT, *supra* note 16, at § 19.

146. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 721-29 (1966); 13 C. WRIGHT & A. MILLER, *supra* note 95, at § 3567.

147. See pp. 760-61 *supra*. In *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966), the Supreme Court used language strikingly similar to that of *Williamson*, explaining its expansion of pendent jurisdiction: "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *Id.* at 724 (footnote omitted).

148. § 61 (Tent. Draft No. 1, 1973).

149. 412 Pa. 496, 194 A.2d 901 (1963). See p. 761 *supra*.

150. FED. R. CIV. P. 13(a) reads in part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Would a party who was able to assert both a federal claim and a pendent state claim in federal court be barred by failure to bring the pendent claim in the federal proceeding? There are few cases on point,¹⁵¹ and the problem ultimately leads to a theoretical exploration of the differences between *res judicata* and full faith and credit.

From the perspective of *res judicata* alone there should be no preclusive effect. In the presence of two independent systems of courts, federal and state, one would be reluctant to extinguish a claim in one simply because it was not brought in joinder in the other. The high value placed by the modern law of preclusion on avoiding relitigation of the same facts operates at most as an argument of good policy, and not of legal compulsion. Compulsory joinder is a fairly new procedure. In light of traditional practice, allowing the separate litigation of unjoined noncompulsory claims can hardly be a denial of due process to defendants. Those ancillary jurisdiction cases which emphasize the right of the federal courts to be free of the burden of relitigation miss the point—the federal courts will in fact be entirely spared.¹⁵² The states would bear the burden; and if they are willing to, no federal policy is violated.

It has to be the principle of full faith and credit which is at stake if *London v. Philadelphia* is correct, and if the rule relating to compulsory counterclaims is to be extended to bar causes which could have been permissively joined but were not. If the rule of bar extends to such claims or defenses, it cannot be justified by conventional invocations of economy, efficiency, and expediency. It will have to be placed

151. *Belliston v. Texaco, Inc.*, 521 P.2d 379, 382 (Utah 1974) ("Under *United Mine Workers v. Gibbs*, the federal district court had the judicial power in the instant case to hear plaintiffs' state claim of unlawful price discrimination. Since plaintiffs failed to assert their state claim when the federal court had the power to adjudicate it with their federal claim, they are barred under the doctrine of *res judicata* from litigating these issues in the instant action." (footnotes omitted)); *Ford Motor Co. v. Superior Court*, 35 Cal. App. 3d 676, 680, 110 Cal. Rptr. 59, 62 (Ct. App. 1973) ("As its federal claim was substantial and Cartrade could and should have sued for both federal and state relief in its earlier federal [antitrust] action, its failure to do so constituted splitting of its one cause of action."); *Brady v. Trans World Airlines, Inc.*, 274 A.2d 146 (Del. Super. Ct.), *aff'd per curiam*, 282 A.2d 620 (Del. 1971); *Martin v. Phillips Petroleum Co.*, 455 S.W.2d 429, 437 (Tex. Civ. App. 1970) (alternate holding); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1315 (5th Cir. 1971) *cert. denied*, 404 U.S. 1047 (1972) (dictum). *But cf.* *Hughes v. Trans World Airlines, Inc.*, 336 A.2d 572 (Del.), *cert. denied*, 423 U.S. 841 (1975).

152. In *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631 (3d Cir. 1961), the court explained its retention, as a counterclaim under ancillary jurisdiction, of a claim that originally had been dismissed for lack of diversity: "The tests are the same because Rule 13(a) and the doctrine of ancillary jurisdiction are designed to abolish the same evil, viz., piecemeal litigation in the federal courts." *Id.* at 633-34. It is hard to see how the federal burden is lessened by taking cases it would not otherwise handle; perhaps it is doing the state a favor that the state does not especially want done for it.

forthrightly on the ground that the integrity of the federal judicial power is at stake, and that the scope of a federal judgment is determined exclusively by federal law—whether declared by Congress or judge-made.

I referred earlier to the American Law Institute's treatment of the problems discussed here.¹⁵³ To the extent the original *Restatement of Conflict of Laws* intended to cover federal judgments at all, it treated them under the general rubric of "foreign judgments." *Restatement (Second) of Conflict of Laws* includes federal judgments only slightly more explicitly.¹⁵⁴ The current provisions are both short and essential enough to be set out in full:

§ 93. Recognition of Sister State and Federal Court Judgments
A valid judgment rendered in one State of the United States must be recognized in a sister State, except as stated in §§ 103-121.

§ 94. Persons Affected
What persons are bound by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.

§ 95. Issues Affected
What issues are determined by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.

If this is a true "restatement," it is difficult to read it other than as saying that the pre-1900 decisions dissected above remain good law today. Those rules are more than a generation obsolete. A different rule is emerging today, and an even stronger one will prevail in the future. It will read something like this:

A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.

153. See p. 759 *supra*.

154. Section 2, Comment c of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) appears expressly to exclude "Federal-State Conflicts" as a topic "not dealt with directly in the Restatement of this Subject." It is hard, however, to ignore the explicit reference to federal judgments in the catch-line of § 93, the more so because of the total silence of the original *Restatement* on federal matters.